NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
MAR 29 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ADAM ROBERT NUNEZ, Appellant.	)	2 CA-CR 2012-0398 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201001774

Honorable Robert Carter Olson, Judge

AFFIRMED IN PART; VACATED IN PART

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M I L L E R, Judge.

¶1 After a jury trial, Adam Nunez was convicted of two counts of aggravated driving under the influence (DUI) while his license was suspended. The trial court

sentenced him to concurrent, six-year prison terms, plus fines, surcharges, and other assessments on each count. On appeal, Nunez contends the trial court erred in denying his motion to suppress and in imposing fines on both convictions. We agree with the latter contention and vacate the fines, surcharges and assessments imposed on one of the convictions. We otherwise affirm the convictions and sentences.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to upholding the convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Early in the morning on July 13, 2006, Pinal County Sheriff's Deputy Delcia Randall and her supervising deputy saw a car drive down Sunland Gin Road near Interstate 10 with blaring music and screaming occupants. After following the car for several blocks and witnessing several instances of erratic driving, Randall pulled the car over and identified Nunez as the driver. Randall noticed a strong odor of alcohol in the car, performed three field sobriety tests on Nunez, and placed him under arrest.

¶3 In August 2010, Nunez was charged with two counts of aggravated DUI: the first alleged impairment to the slightest degree; the second alleged driving with a blood alcohol concentration (BAC) of .08 or more. Before trial, he moved to suppress the evidence resulting from the traffic stop, but the trial court denied his motion. A jury found him guilty on both counts.

Discussion

Motion to Suppress

¶4 Nunez first contends that the trial court erred in denying his motion to suppress because the deputies did not have reasonable suspicion for the traffic stop. Specifically, Nunez argues that the stop was illegal because the driver never committed a traffic violation, because Deputy Randall's decision to pull over the car was made on a "hunch," and because Randall could not identify Nunez as the driver of the vehicle at the time the suspicious driving took place.

¶5 "When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, ¶ 5, 243 P.3d 628, 630 (App. 2010) (citations omitted). We defer to the trial court's findings of fact, including its evaluation of witnesses' credibility, but review de novo the court's determinations of reasonable suspicion and probable cause. *State v. Olm*, 223 Ariz. 429, ¶ 9, 224 P.3d 245, 248 (App. 2010); *State v. Sweeney*, 224 Ariz. 107, ¶ 12, 227 P.3d 868, 872 (App. 2010).

¶6 A traffic stop constitutes a seizure under the Fourth Amendment, but because such stops are less intrusive than arrests, officers do not need probable cause to justify them. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). Instead, officers need only reasonable, articulable suspicion that the driver is involved in criminal activity. *Tornabene v. Bonine ex rel. Ariz. Hwy. Dept.*, 203 Ariz. 326, ¶ 27, 54 P.3d 355, 365

(App. 2002). "Hunches, intuition, and 'unparticularized suspicion' are not enough." *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997), *quoting State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982). Rather, reasonable suspicion is based on the totality of the circumstances, taking into account "such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge." *Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d at 956.

¶7 At the suppression hearing, Deputy Randall testified that the car first caught her eye when she heard the loud music and loud voices coming from it and that she suspected some of the occupants might have been underage. Randall, who was a new deputy on field training at the time of the incident, began following the vehicle, noticing that it was "riding the center line," a behavior Randall said she learned through training and experience that indicated an impaired driver. Randall then saw the car make a left turn, briefly cutting across lanes for oncoming traffic in the process. The car's left-turn blinker was still on when the car made a right turn into a residential driveway. The car stopped and everyone began to get out.

¶8 Deputy Randall testified that she initially planned to continue on, assuming that the driver had made it home safely, but decided to circle back. When she arrived about fifteen seconds later, the car was driving away, while a woman in a robe stood in the front yard, waving at Randall and gesturing to the car. Randall caught up to the car and pulled it over. She identified the driver as Nunez and testified that she did not believe any of the passengers had stayed back at the house when the car stopped.

¶9 During the suppression hearing, Deputy Randall summarized her reasons for suspecting impairment:

> With everything combined, the screaming, driving down the road, loud vehicle at 1:30 in the morning, driving along the center line, the wide left turn, leaving the blinker on, making a right turn opposite to the blinker direction and the final conducting a security check back at the residence and the woman pointing, to me, at the vehicle, obviously, didn't belong at the residence.

The trial court denied Nunez's motion to suppress, finding that the state "met its burden and . . . articulated a reasonable suspicion for the traffic stop."

¶10 Nunez relies on *State v. Fikes*, 228 Ariz. 389, 267 P.3d 1181 (App. 2011) to support his argument that the stop was illegal because the driver never committed a traffic violation. In *Fikes*, however, the officer admitted his only reason for pulling over the car was because one brake light was not working, which the officer erroneously believed was illegal—"[t]he officer observed no other traffic infractions, nor did the officer articulate any other reason for the stop." *Id*. ¶ 2. Here, during the suppression hearing, Deputy Randall articulated several reasons for suspecting the driver was impaired, and a traffic violation was not required. *See State v. Winter*, 146 Ariz. 461, 466, 706 P.2d 1228, 1233 (App. 1985) (reasonable suspicion found where vehicle drove close to median and weaved inside lane) *abrogated on other grounds in State v. Kamai*, 184 Ariz. 620, 911 P.2d 626 (App. 1995); *see also State v. Superior Court*, 149 Ariz. 269, 273, 718 P.2d 171, 175 (1986) (weaving within lane was "a specific and articulable fact which justified an investigative stop").

¶11 Likewise, Nunez's argument that Deputy Randall's decision to circle back was a "hunch" ignores the list of reasons Randall gave for pulling over the vehicle. Randall testified that she initially planned to let the car go when it pulled into the driveway, because "part of the reason for making a stop on an impaired driver is to make sure they are home safe." Although her reason for circling back was because "things [were] not settling right" with her, when she turned back, the car had pulled away and a woman in a bathrobe was waiving and pointing, suggesting that the car had not belonged at that address. Her "hunch" to circle back did not negate her articulated reasons for suspecting impairment.

¶12 Nunez also argues that because Deputy Randall lost sight of the vehicle while she circled the block near the residence, she could not identify Nunez as the driver responsible for the erratic driving she had witnessed on the way to the residence. Randall testified that, as she drove by the house, she saw the driver and passengers getting out of the car. She also testified that the car was out of her sight for only ten to fifteen seconds before she caught up to it again. In light of this testimony, the trial court could reasonably infer that Nunez was the driver both before and after the car stopped at the house.

¶13 Considering the totality of the circumstances: the time of day, the loud music and shouting, "riding" the center line, cutting the left turn, leaving the blinker on, and stopping at a home where the car apparently did not belong, we agree with the trial court that Deputy Randall articulated a reasonable suspicion for the traffic stop. *See State v. Superior Court*, 149 Ariz. at 273, 718 P.2d at 175; *see also State v. Atkinson*, 916 P.2d

1284, 1286 (Idaho Ct. App. 1996) (reasonable suspicion found where vehicle touched center line twice and fog line once, late on a Friday night); *Winter*, 146 Ariz. at 466, 706 P.2d at 1233. The court did not abuse its discretion in denying Nunez's motion to suppress.

¶14 Nunez's second contention regarding the motion to suppress is that his motion addressed not only reasonable suspicion for the stop, but also probable cause for the arrest, and that the state did not meet its burden to establish the arrest was based on probable cause. However, Nunez's motion before the trial court made no specific mention of whether the deputies had probable cause for the arrest; instead, the argument was focused on reasonable suspicion and the only facts stated in support were those leading up to the traffic stop. Further, there is no indication in the record that the trial court made a ruling as to the issue of probable cause, or that Nunez brought the issue to the court's attention; there is no mention of probable cause at all at the suppression hearing.

¶15 Nunez's failure to object forfeits review of this issue on appeal for all but prejudicial, fundamental error. *See State v. Kinney*, 225 Ariz. 550, ¶¶ 8-11, 241 P.3d 914, 919 (App. 2010) (objection on one ground does not preserve another issue where not mentioned during evidentiary hearing and not referenced in minute entry ruling). Moreover, the absence of a fundamental error argument on appeal waives the issue, although the appellate court will not ignore fundamental error if it finds it. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (waiver); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will address

fundamental error if it finds it). The probable cause issue was forfeited, and, in any event, we find no fundamental error.

Double Punishment

¶16 Nunez next argues, and the state concedes, that "[i]t was illegal for the court to impose a separate fine on each of the two counts" of DUI. Because Nunez did not object to the fine below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "[T]he imposition of an illegal sentence constitutes fundamental error." *State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009).

¶17 Pursuant to A.R.S. § 13-116, "[a]n act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Our supreme court has held that although a single instance of driving under the influence can lead to convictions of both (1) driving under the influence of intoxicating liquor, and (2) driving with a blood alcohol content over the statutory limit, that single act may only be punished with concurrent sentences. *Anderjeski v. City Court of City of Mesa*, 135 Ariz. 549, 550-51, 663 P.2d 233, 234-35 (1983). Further, any fine "imposed upon an individual by a sentencing court constitutes a 'sentence' within the meaning of the double punishment statute, § 13-116, and is subject to its mandate requiring the imposition of concurrent sentences upon an individual convicted of multiple offenses arising out of one act." *State v. Sheaves*, 155 Ariz. 538, 541, 717 P.2d 1237, 1240 (App. 1987) (defendant with two

felony convictions for single act of driving under the influence shall pay only one felony penalty assessment).

¶18 Here, the trial court imposed more than $4,600 in fines and other assessments for each count. Nunez's convictions arise out of the same act of driving on July 13, 2006. The trial court erred in imposing separate fines for each conviction in violation of A.R.S. § 113-16. Because the sentence was illegal, Nunez has sustained his burden of showing fundamental, prejudicial error. *See State v. Bouchier*, 159 Ariz. 346, 347, 767 P.2d 233, 234 (App. 1989); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Disposition

¶19 Nunez's convictions are affirmed. The sentence, fine, surcharges, and assessments on the conviction for Count I, aggravated DUI (driving while under the influence of intoxicating liquor and impaired to the slightest degree), are affirmed. The sentence for Count II, aggravated DUI (BAC of .08 or more), is also affirmed; however, the related fine, surcharges, and assessments are vacated. *See* A.R.S. § 13-4037(A).

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge